EVERSHEDS SUTHERLAND

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A Bright Spark …

Sparks v Biden [2017] EWHC 1994 (Ch)

Intro:

The Court was willing to imply a term into an option agreement requiring a developer to market and the sell houses it had developed. The Court was to supervise the sale process through specific performance.

A seller granted a developer an option to purchase a piece of land which had the potential for redevelopment. If the option was exercised the purchase price was £600,000 plus an overage payment.

"Overage" is a sum of money, in addition to the sale price, which the seller may be entitled to receive after completion, if certain conditions are met.

The agreement required the developer to apply for the relevant planning permission and to use "all reasonable endeavours to obtain" the planning permission. If exercised and the sale completed, the developer was required to "proceed as soon as practicable" to construct the development.

Planning permission was granted and the developer exercised the option, completed the purchase and built 8 houses.

The obligation to pay overage depended on the sales of the houses and the seller was to receive a minimum overage payment of £700,000, with the balance falling due on the sale of the final house.

The developer decided to occupy one of the houses and let the other 7 houses on short term tenancies. The agreement did not contain an express term obliging the developer to market the houses for sale once completed or any mechanism for the payment of the overage if the houses failed to sell within an appropriate time – the developer argued that any obligation to pay overage could be delayed indefinitely.

The seller argued that the developer's interpretation of the agreement fundamentally undermined the underlying purpose of the agreement and he applied to the Court for a term to be implied into the agreement requiring the developer to market and sell the houses either "as soon as reasonable practicable" or "within a reasonable period of time".

Decision:

The Judge held that a term should be implied into the agreement obliging the developer to market and sell each of the houses within a "reasonable time" of the option having been exercised and planning permission obtained.

The Judge found that the insertion of the above implied term:

1. was necessary as a matter of business efficacy – without it the option agreement lacked practical and commercial coherence (business efficacy test)
2. it was so obvious that it goes without saying that it should have been included in the option agreement (officious bystander test)

The Judge ordered that, due to the resistance to sell the houses, an order for specific performance was appropriate. Specific performance is a remedy which compels a party to perform a contract.

The Judge recognised the difficulties in ordering exactly how specific performance would take place – the time for selling each house may vary. The Judge therefore ordered specific performance but adjourned the working out of the order to the Master at a case management conference.

Key points

- An express provision would have been preferable to cover the possibility of the developer choosing not to sell the houses.
- The Court was willing to order specific performance requiring the developer to sell the houses.
- Whilst the Court was willing to order that a term be implied into the agreement in this case, there is no guarantee that the courts will intervene where the parties have failed to include an express provision so careful consideration/forethought is needed when drafting an option agreement

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